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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

NO. [redacted]15

A. S. ALEXANDER, H. D. RUMMEL and GEORGE S. BATON, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a Corporation, Petitioners,

v.

J. H. HILLMAN, JR., A. B. SHEETS, THOMAS WATSON, HILLMAN COAL AND COKE COMPANY, a Corporation, and HECLA COAL AND COKE COMPANY, a Corporation, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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May it please the Court:

The petition of A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a corporation, respectfully shows to this Honorable Court:

I.

SUMMARY STATEMENT OF MATTERS INVOLVED

(a)

Statement of Facts

By a decree affirmed by the Circuit Court of Appeals for the Fourth Circuit, (64 Fed. 2nd, 817; certiorari denied, 290 U. S. 678, 78 L. Ed. 86), the District Court directed that the business and affairs of Tower Hill Connellsville Coke Company of West Virginia (hereinafter called "Tower Hill") be wound up and its assets distributed among its creditors and stockholders according to their respective rights, and appointing Receivers (Petitioners) for that purpose.

After the coming down of the mandate, the District Court, on December 12, 1933, referred the cause to a Special Master (R., p. 1), "to take, state and report an account and report to the Court" all the debts, obligations and claims against Tower Hill and the nature, amount and respective priorities thereof; the owners of its preferred stock and common stock, and "such other matters as any party in interest may require, the same being pertinent, or such other matters as said Master himself may deem pertinent, whether so required or not."

At a hearing before the Master held January 30, 1934, after due notice, the Respondents, who are hereinafter referred to as "Hillman", "Sheets", "Watson", "Hillman Company" and "Hecla", respectively, severally appeared and made proof of certain claims. Each of them is a non-resident of the Southern District of West Virginia. Hecla's claim is as a holder of preferred and common stock of Tower Hill (R., p. 4); Hillman's is for salary (R., p. 44); Watson's for attorney's fees and salary (R., p. 6); and Hillman Company's for a balance of

operating expenses and rentals under a pool arrangement (R., p. 11). Hillman and Sheets claim as sureties on the supersedeas bond upon a former appeal (R., p. 15).

Thereafter Petitioners, on February 19, 1934, tendered for filing an Ancillary Bill (R., p. 46), averring that Respondents had severally appeared; that they were each indebted to Tower Hill in large sums of money by reason of certain facts therein set out in detail, and praying that they be required to account and pay what upon such accounting appeared to be justly due and owing to Tower Hill. The matters complained of are cognizable in a court in equity. They all relate to the fraudulent mismanagement of the business and affairs of Tower Hill by Hillman, Sheets and Watson, who were its officers and directors, and in which the other Respondents participated or from which they benefited.

On presentation of the Ancillary Bill, the Court entered a decree ordering it to be filed, and directing that "for convenience the Clerk be, and hereby he is directed to give it a separate number but that it and all proceedings pursuant thereto shall be ancillary to this cause" (R., p. 22). The order prescribed how notice should be given to each Respondent and when he or it should plead (R., p. 22).

Conformably to said order, the Ancillary Bill was filed and assigned a separate number, 3370, (R., p. 46) and the prescribed notice given (R., pp. 66, 67).

March 19, 1934, Respondents filed two motions denying the jurisdiction of the Court to entertain the Ancillary Bill, one at No. 1434 (this case) and the other at No. 3370, the number assigned to the Ancillary Bill. The motion in this case is entitled "Motion to Vacate Order of Court Entered February 19, 1934, and to Quash Service of Said Order and of the Bill of Complaint Therein Mentioned", whereby Respondents moved "to

quash the service of the said order and of the Ancillary Bill of Complaint therein mentioned and filed at No. 3370 in Equity of this Court", (R., p. 23). The other, filed at No. 3370, is entitled "Motion to Quash Service and to Dismiss Bill for Want of Jurisdiction", whereby Respondents moved "to quash the service of a copy of the order entered by this court in the case of Piedmont Coal Company and others against Tower Hill Connellsville Coke Company of West Virginia, No. 1434 in Equity, and a copy of the Bill of Complaint filed at the above Number in Equity and therein designated as 'Ancillary Bill of Complaint' and to dismiss said Bill for want of jurisdiction" (R., p. 69).

Thereafter, in June, 1934, the District Court handed down a memorandum decision (R., p. 26), and on July 30, 1934, entered its decree in this case (R., p. 25), making the memorandum decision a part of the Record, sustaining Respondents' motion and dismissing the Ancillary Bill for want of jurisdiction over the persons of Respondents. On the same day the Court entered a substantially similar decree at No. 3370 (R., p. 70).

From each of these decrees Respondents appealed, the one being No. 3736 in the Circuit Court of Appeals, and the other No. 3737. The former is from the decree in this case and the latter from the decree at No. 3370.

January 22, 1935, the Circuit Court of Appeals, in an opinion by Northcott, J. (R., p. 76), Soper, J. dissenting (R., p. 86), entered a decree in each of the appeals, modifying the decree by directing that the Ancillary Bill be retained for certain purposes, and that the pleadings be amended in certain respects, and otherwise affirming it.

A petition for reargument was presented in due season, which on March 2, 1935 the Circuit Court of Appeals denied (R., p. 97).

(b)

History of Case in Lower Court

As already stated, there was a reference to a Special Master to ascertain the creditors and stockholders of Tower Hill and their respective rights and priorities.

Respondents appeared and claimed participation in the res in possession of the Court—four of them as creditors and the fifth as a stockholder. By the Ancillary Bill, Petitioners (Receivers), on behalf of all Tower Hill's creditors and stockholders, asserted equitable counterclaims against Respondents and sought to have the Court adjudicate not only Tower Hill's liability to Respondents but their liability to Tower Hill. The District Court held that because Respondents were not subject to its process in a plenary suit, its jurisdiction was limited to Respondents' claims against the res and that it had no jurisdiction to grant affirmative relief against Respondents upon the counterclaims. It dismissed the Ancillary Bill.

The Circuit Court of Appeals affirmed the District Court in holding want of jurisdiction to grant affirmative relief against Respondents upon the counterclaims. In modifying the decree, the Court of Appeals remanded the case "to the end that the court below may give consideration to the question of staying action on the claims pending the adjudication of the counterclaims in a court of competent jurisdiction, and that it may consider any matter set up in the bill which may appropriately be considered as matter of defense against the claims filed". It further directed "that new pleadings be filed in lieu of the ancillary bill, setting up as against each claim filed with the receivers any purely defensive matter which the receivers may desire to assert, together with any matter which would justify the court in staying action on the claims pending the ad-

judication of any counterclaim or counterclaims in a court of competent jurisdiction" (R., p. 85).

(c)

Question Presented

When a claimant appears before a master in a federal receivership proceeding and proves a claim against the receivership res, does he submit himself to the jurisdiction of the receivership court for the adjudication of his liability to the res, when the counterclaim asserted against him by the receiver is of a nature cognizable in equity and its adjudication is essential to a final disposition of the receivership proceeding?

Is not the adjudication of the counterclaim against the claimant and the determination of the whole controversy within the purpose and intendment of Equity Rule 30?

II.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

The question thus presented has never been decided by this Court. As it affects materially the prompt and orderly administration of equity receivership estates and involves the application of Equity Rule 30, it is an important question of federal law which should be settled by this Court.

Wherefore, your Petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Fourth Circuit, commanding that Court to certify and to send to this Court, for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and

all proceedings in this case, numbered and entitled on its Docket No. 3736, A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a corporation, Appellants, v. J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company, a corporation, and Hecla Coal and Coke Company, a corporation, Appellees, and that said decree of the Circuit Court of Appeals for the Fourth Circuit may be reversed, and that your Petitioners may have such other and further relief in the premises as to your Honorable Court may seem meet and just.

And your Petitioners will ever pray.

EDWIN W. SMITH,

ARTHUR S. DAYTON,

E. C. HIGBEE,

WM. M. ROBINSON.

Counsel for Petitioners.

Dated: April ...., 1935.

Pittsburgh, Pa.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I.

Opinions Below

The opinion of the District Court (McClintic, J.) was made part of the Record (R., p. 26) July 30, 1934. It has not been reported.

The opinion of the Circuit Court of Appeals (Judges Parker, Northcott and Soper) was written by Judge Northcott and was filed January 22, 1935 (R., p. 76). Judge Soper filed a dissenting opinion (R., p. 86). These opinions are as yet unreported.

II.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. Sec. 347). The decree of the Circuit Court of Appeals was entered January 23, 1935 (R., p. 88). A motion for a rehearing was denied March 2, 1935 (R., p. 97).

III.

Statement of the Case

The material facts, with appropriate page references to the printed Record, are stated in the petition, supra, pages 2 to 5 inclusive. A summary of the argument appears in the index. All the errors assigned in the Court below are intended here to be urged (R., p. 28).

IV.

ARGUMENT

(a) *Jurisdiction of Subject-Matter*

A District Court administering a receivership estate has absolute authority to adjudicate all claims respecting the res, not only those against the res but those on behalf of the res against others. The Circuit Court of Appeals so held.

This proposition is settled by—

White v. Ewing, 159 U. S. 36; 40 L. Ed. 67;
Peck v. Elliott, 79 Fed. 10.

The Circuit Court of Appeals so held (R., P. 80) and Respondents so concede. In their brief in that Court they said:

> "Appellees do not question the jurisdiction of the Court below to maintain an action by the Receivers to recover moneys due them in said Court in an action wherein the defendants are residents of the said district."

(b) *Jurisdiction of Persons of Respondents*

When Respondents appeared before the Special Master and asserted claims against the receivership res, the Court, in the receivership proceeding, acquired jurisdiction to grant affirmative relief against them upon equitable counterclaims asserted by the receivers. The Circuit Court of Appeals erred in not so holding.

(1) EQUITY RULE 30.

The second paragraph of this Rule is—

"The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject-matter of the suit, and may, without cross-bill, set up any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counterclaim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final decree in the same suit on both the original and the cross-claims."

In *American Mills Co. v. American Surety Co. of New York,* 260 U. S. 360; 67 L. Ed. 306, this Court, by Mr. Chief Justice Taft, said (364, 309):

"The new Equity Rules were intended to simplify equity pleading and practice by limiting the pleadings to a statement of ultimate facts without evidence, and by uniting in one action as many issues as could conveniently be disposed of. • • • The counterclaim referred to in the first part of the paragraph (Equity Rule 30) must therefore be an equitable counterclaim—one which, like the set-off or counterclaim referred to in the next clause, could be made the subject of an independent bill in equity. The counterclaim and the set-off and counterclaim in the two clauses are in pari materia except that the first grows out of the subject-matter of the bill and the other does not. That which grows out of the subject-matter of the bill must be set up in the interest of an end of litigation. That which does not may be set up, if the defendant wishes, in one proceeding in equity quickly to settle all equitable issues capable of trial between them in such a proceeding, even though they are not re-

lated. *Buffalo Specialty Co. v. Van Cleef*, 217 Fed. 91. The formality of cross bills is not required, and the rule goes as far as possible to facilitate the prompt disposition of equitable controversies between the same litigants. The rule should be liberally construed to carry out its evident purpose of shortening litigation, but the limitation of counterclaims to those which are equitable is imperative."

In *Buffalo Specialty Co. v. Van Cleef*, 217 Fed. 91, cited by Mr. Chief Justice Taft, it is said (93):

"It will be seen that Rule 30 requires defendant to set up any counterclaim which arises out of the transaction forming the subject-matter of the bill, but allows without requiring him to set up any equitable counterclaim or set-off which might be the subject of an independent suit by defendant against plaintiff. The language is perfectly clear: If defendant has an independent cause of action in equity against plaintiff, he may counterclaim it. If any corroboration of this view were needed, it is found in the fact that the Supreme Court, in adopting the rule, omitted the last clause of the English rule which restricts counterclaims to those which can be conveniently disposed of and those which ought to be allowed. Not only was any set-off or counterclaim which may be the subject of an independent suit included, but an exception was rejected. Moreover, it has always been held by the English courts that independent causes of action, wholly unconnected with the claim of the plaintiff, may be counterclaimed."

Since the Respondents, by assertion of their claims in the receivership proceeding, are seeking affirmative relief against the res, their demands, without regard to the form in which they are cast, are in essence bills in

equity against Tower Hill, and the Ancillary Bill, notwithstanding its form, is likewise in essence an answer setting up counterclaims, which, although they might have been the basis of an independent bill, are still within the express terms of Equity Rule 30.

If "the new Equity Rules were intended to simplify equity pleading and practice" and Rule 30 "goes as far as possible to facilitate the prompt disposition of equitable controversies between the same litigants," Petitioners respectfully submit that the very purpose of the Rule requires the District Court to adjudicate not only Respondents' right to participate in the res but their liability to account to the res, and to settle in one proceeding all controversies between Petitioners and Respondents respecting the res.

This is in harmony with an established equity doctrine thus stated by Mr. Chief Justice Taft, speaking for this Court, in *Hartford Accident and Indemnity Co. v. Southern Pacific Co.*, 273 U. S. 207; 71 L. Ed. 612 (217, 616):

> "Where a court of equity has obtained jurisdiction over some portion of a controversy, it may and will in general proceed to decide the whole issues and award complete relief even where the rights of parties are strictly legal and the final remedy granted is of the kind which might be conferred by a court of law."

Since all counterclaims asserted against Respondents in the Ancillary Bill are of a character cognizable in equity, no right of trial by jury is involved. This fact seems to have been overlooked by the Circuit Court of Appeals. In its opinion, Judge Northcott says (R., p. 84):

> "The claimants, by filing their claims in a court of equity, waive their right of jury trial with re-

spect to the claims filed, but they do not waive such right with respect to independent claims against them which the receivers may seek to assert by way of counterclaim. It is well settled that a counterclaim involving a cause of action at law cannot be asserted in a suit in equity, because of the right of the party against whom it is asserted to a jury trial under the Seventh Amendment to the Constitution. *American Mills Co. v. American Surety Co.*, 260 U. S. 360; *Sinclair Refining Co. v. Midland Oil Co.*, (C. C. A., 4th), 55 Fed. (2d) 42, 47."

What is there said appears to be, in large measure, the ratio decidendi, but is without application to this case. Every counterclaim asserted against Respondents is clearly cognizable in equity and could have been the basis of an independent action in equity by the Receivers against Respondents, or by Tower Hill itself had there been no receivership.

The application of Equity Rule 30 to this case is well stated by Judge Soper in his dissenting opinion (R., p. 87):

"Furthermore, there seems to be no important reason why Equity Rule 30, promulgated November 4, 1912, should not be applied to the situation which arises when a receiver has a set-off or counterclaim in equity, growing out of an independent transaction, against a claimant. This rule provides in substance that the defendant in his answer to a suit in equity may, without cross-bill, set up any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counterclaim shall have the same effect as a cross suit, so as to enable the court to pronounce a final decree in the same suit on both the original and the counterclaim. By

the passage of this rule, the Supreme Court, in order to make it possible to put an end to all controversies between the same parties in a single suit, changed the former practice which confined set-offs and counterclaims to those which arose out of the transaction that formed the basis of the original suit. Since the filing of a disputed claim against a receiver in an equity proceeding is in one aspect a separate suit, it falls within the scope of Equity Rule No. 30, and the receiver should have the same right to set-off or counterclaim as would have been accorded to the corporation before the receiver was appointed."

(2) RESPONDENTS SUBMITTED TO THE JURISDICTION

Submission to the jurisdiction of a court may result from some act intended to have that effect, such as a praecipe for appearance, or, on the other hand, may be by some step taken in the course of a cause which in law has that effect, although it may not have been so intended. This is aptly expressed by Mr. Chief Justice Fuller in *Wabash Western Ry. Co. v. Brow*, 164 U. S. 271; 41 L. Ed. 431 (278; 434):

> "An appearance which waives the objection of jurisdiction over the person is a voluntary appearance, and this may be effected in many ways, and sometimes may result from the act of the defendant even when not in fact intended."

Although in particular cases there may be other governing criteria, an inerrant test of what constitutes a general appearance conferring jurisdiction over the person is whether he has become an actor in the cause.

This principle is clearly established by *Merchants Heat & Light Co. v. James B. Clow & Sons*, 204 U. S. 286;

51 L. Ed. 488. Although different in its facts, that case is identical in principle with the one at bar. The suit was in the Circuit Court of the United States for the Northern District of Illinois by a citizen of that State against a citizen of Indiana. The defendant moved to set aside the service, the ruling was adverse, and it excepted. It then answered and set up a counterclaim by way of recoupment and sought to recover a balance. Judgment went against it and it appealed to this Court, assigning as error the denial of its motion to set aside the service. This Court declined to express an opinion upon the merits of the motion "because it is not necessary for the decision of the case, in view of the submission to the jurisdiction which the facts disclose." However, assuming that defendant lost no rights by pleading to the merits, as required, after saving its rights, the Court held that "by setting up its counterclaim the defendant became a plaintiff in its turn, invoked the jurisdiction of the Court in the same action, and, by invoking, submitted to it." Mr. Justice Holmes said (290; 490):

> "There is some difference in the decisions as to when a defendant becomes so far an actor as to submit to the jurisdiction, but we are aware of none as to the proposition that when he does become an actor in a proper sense he submits,"

and again (290; 490):

> "* * * there is no question at the present day that, by an answer in recoupment, the defendant makes himself an actor, and, to the extent of his claim, a cross plaintiff in the suit."

That Respondents became actors in the receivership proceeding is beyond question. Pursuant to the order of reference directed for the purpose of determining the parties entitled to distribution of the res, Re-

spondents, at a hearing regularly held by the Special Master as part of the proceedings in this cause, presented formal proofs of claim, procured them to be made a part of the Record and offered evidence in support of them. Thereby they came into the cause to gain the benefit and avail themselves of the advantages of the decree creating the fund in which they seek to share. The course they pursued is the exact legal equivalent of an action against Tower Hill had there been no receivership. In such contingency, they would have exposed themselves to the risk of counterclaim and set-off. Having presented their claims or, in legal effect, instituted their suits, the Ancillary Bill is but a method of bringing the counterclaims of Tower Hill, now represented by the Receivers, on the record.

The Circuit Court of Appeals does not controvert the proposition that Respondents became actors in the receivership cause and by their claims sought affirmative relief against the assets of Tower Hill, but it relieves each Respondent from liability to counterclaim because "he is not in a court of his own choosing but in a court selected by others." Judge Northcott says (R., p. 83):

> "One filing a claim with a receiver, however, is in a very different position from one who has filed a bill in equity. He is not in a court of his own choosing, but in a court selected by others, which has taken into its possession the only property from which he can obtain payment of his claim. The complainant who files a bill in equity, and thus subjects himself to equitable counterclaims of the defendant, has had the option of going into either the state or federal courts and of suing in any district in which jurisdiction of the defendant can be obtained. The claimant who files claim with a re-

ceiver, on the other hand, has had no option whatever."

Judge Northcott cites *General Electric Co. v. Marvel Rare Metals Co.*, 287 U. S. 430; 77 L. Ed. 408, and quotes from the opinion of Mr. Justice Butler:

> "The setting up of a counterclaim against one already in a court of his own choosing is very different, in respect to venue, from hailing him into that court."

The Court was there considering the waiver of venue and the statement is to bring in contrast the difference on that point between a party already in court on his own suit and one brought in by process.

In that case, New York corporations brought suit in a District Court of Ohio and defendants set up a counterclaim praying an injunction and accounting. Plaintiffs moved to dismiss the counterclaim for want of jurisdiction, alleging that under the relevant Sections of the Judicial Code they were not liable to suit in that District. The District Court sustained the motion, the Circuit Court of Appeals reversed and this Court affirmed. The decision was that plaintiffs having brought their suit in the particular district, were liable to counterclaim in that action notwithstanding that they were not amenable to the process of that Court. The phrase "a court of his own choosing", as thus used, is without the remotest application to any question here involved, and to the extent that the doctrine of that decision has any application to the question here presented, it is favorable to Petitioners.

The Circuit Court of Appeals seems to concede that had there been no receivership, Tower Hill could have maintained the counterclaims now asserted by the Receivers because, perchance, Tower Hill may have been

subject to the process of more than one court, but denies the Receivers' counterclaims because by operation of law claims against Tower Hill's assets can be asserted in only one court. Petitioners respectfully submit that there is no reasonable ground for such distinction.

The law vesting the District Court with jurisdiction to administer the res and to determine claims against it is what required Respondents to come into that tribunal. That law deprived them of no right. It left them perfectly free to go in or stay out, just as before the receivership they were free to sue or not to sue as they chose. The only effect of the receivership was to restrict the tribunals in which they otherwise might have asserted their claims to the particular one having custody of the res.

Had there been no receivership, they could have sued in any court having jurisdiction—federal or state—but they would have run the risk of counterclaim and set-off exactly as is set up in the Ancillary Bill, and to hold, as the Circuit Court of Appeals did, that the result of the receivership is to afford them an immunity they otherwise would not have had, is to defeat the very purpose of the law vesting a court having possession of a res with power to determine the liability of third persons to it.

When a party institutes a suit, he considers what claims, whether by recoupment or recovery of a balance, may be made against him, and of that he runs the risk. He has no vested right to sue or be sued in a particular court. All that he is entitled to is due process of law and the equal protection of the law, and for the District Court to determine Respondents' liability to the res as well as the liability of the res to them denies them neither.

Whether the District Court should adjudicate Tower Hill's claim against Respondents was a matter of choice with them. They were not obliged to invoke its jurisdiction and Petitioners were powerless to compel them to do so.

Just as does any suitor, they decided to proceed and thereby subjected themselves to the dangers incident to such a course, in this instance, the hazard of having it judicially determined that instead of Tower Hill's owing them they were actually indebted to it. They knew the worth of their demands and the strength of the counter charges against them, and their choice to move to enforce the former is but an election to pit them against the latter.

The Circuit Court of Appeals did not base its decision in any way on the question of venue, which Respondents in that Court said was, in the final analysis, the only issue involved. It is, therefore, not necessary to discuss that point, but it may be observed that under the facts any question of venue is waived.

General Electric Co. v. Marvel Rare Metals Co., 287 U. S. 430; 77 L. Ed. 408;
Thames & Mersey Marine Insurance Co. v. United States, 237 U. S. 19; 59 L. Ed. 821;
Burnrite Coal Briquette Co. v. Riggs, 274 U. S. 208; 71 L. Ed. 1002.

V.

Conclusion.

It is, therefore, respectfully submitted that this case calls for the exercise by this Court of its supervisory powers in order that the novel and important question of federal jurisdiction and procedure therein may be decided by this Court, and that to such end a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals for the Fourth Circuit and finally reverse it.

EDWIN W. SMITH,

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WM. M. ROBINSON,
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